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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted in accordance with Assembly resolution 71/198.

* A/73/150.

** The present report was submitted after the deadline in order to be able to reflect the most recent developments.

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Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions

Saving lives is not a crime

Summary

The present report contains an outline of the main activities undertaken by the Special Rapporteur from 1 February 2017 to 31 July 2018, including 183 communications to States and non-State actors, 78 press statements and her second report to the Human Rights Council on the human rights obligations of armed non-State actors with respect to the right to life.

Entitled "Saving lives is not a crime", the present report is focused on the criminalization and targeting of humanitarian services and actors arising from activities to fight terrorism and deter migration and from the outlawing or stigmatization of sexual and reproductive rights. The Special Rapporteur argues that by obstructing the provision of life-saving services and criminalizing acts of solidarity, States are violating normative pillars of international human rights and humanitarian law. What follows are arbitrary deprivations of life under the convenient banners of fighting terrorism, combating smuggling or guarding social mores.

Some positive, yet ad hoc, developments at the United Nations are identified, along with good practices of Member States, which ought to be expanded and emulated. The Special Rapporteur recommends in particular that the Security Council adopt a resolution exempting humanitarian actions from all counter-terrorism measures, exempting humanitarian acts and acts of solidarity from national smuggling legislation and narrowing the international funding gap for comprehensive sexual and reproductive health services. She calls upon States to end all forms of criminalization, harassment and stigmatization of individuals and organizations providing life-saving services.

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I. Introduction

1. The present report is submitted by the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions pursuant to General Assembly resolution 71/198 and Human Rights Council resolution 35/15. It summarizes the activities undertaken by the Special Rapporteur during the past year and includes her thematic report focusing on the criminalization and targeting of life-saving and protective services for people in need.

II. Activities of the Special Rapporteur

A. Country visits

2. At the invitation of the respective Governments, the Special Rapporteur carried out official visits to Iraq from 14 to 23 November 2017 (A/HRC/38/44/Add.1) and to El Salvador from 25 January to 5 February 2018 (the report on which will be issued under the symbol A/HRC/38/44/Add.2).

3. The Special Rapporteur sent requests for official visits to the Governments of Afghanistan, Bangladesh, Brazil, the Democratic Republic of the Congo, Libya, the Syrian Arab Republic, the United States of America and Venezuela (Bolivarian Republic of), and reminders to Kenya, Nigeria, Pakistan and Yemen.

4. She thanks the Governments of Mozambique and Nigeria for responding positively to her requests to visit and encourages the Governments of the other above-mentioned States to extend an invitation for a visit in the near future.

B. Communications and press releases

5. Between 1 February 2017 and 31 July 2018, the Special Rapporteur issued, alone or jointly with other special procedures, a total of 183 communications to States and non-State actors and 78 press statements. Detailed information can be found in the overview of the activities of the Special Rapporteur (A/HRC/38/44/Add.3) and the public communications database for special procedures.[1]

C. Meetings and other activities

6. The Special Rapporteur presented her second report to the Human Rights Council on the human rights obligations of armed non-State actors with respect to the right to life (to be issued under the symbol A/HRC/38/44).

7. From July 2017 to July 2018, the Special Rapporteur chaired, organized and/or participated in 22 international meetings, conferences and other events, a number of which are listed below (for a full overview, see A/HRC/38/44/Add.3):

- Expert workshop on witchcraft and human rights organized by the independent expert on the enjoyment of human rights by persons with albinism (September 2017, Geneva)
- Global compact for migration, preparatory meeting (December 2017, Puerto Vallarta, Mexico)

[1] https://spcommreports.ohchr.org/

- Briefing for Security Council members on Iraq organized by the Government of the Netherlands (February 2018, New York)
- Expert meeting on the draft treaty on crimes against humanity (March 2018, New York)
- Expert panel on accountability for killings of women and lesbian, gay, bisexual, transgender and intersex persons during conflict, held on the sidelines of the session of the Commission on the Status of Women (March 2018, New York)
- Celebration of the twenty-fifth anniversary of the World Conference on Human Rights, Federal Ministry for Foreign Affairs of Austria (May 2018, Vienna)
- Launch of the inquiry report of the All-Party Parliamentary Group on Drones of the United Kingdom of Great Britain and Northern Ireland, "The UK's use of armed drones: working with partners" (July 2018, London)

III. Saving lives is not a crime

8. In 2017, 73 individuals signed the following statement:[2]

> We the undersigned, Jewish children hidden during the Second World War to escape deportation, solemnly declare: if we are alive, it is because a united group of lawbreakers disobeyed, hid us, fed us, despite the laws of the Vichy regime and the occupying force. They opened their doors and falsified our identities; they kept their silence, ignoring orders of the police and the administration, and took back roads in the face of persecution.
>
> Their solidarity has now been publicly recognized. We are grateful to them, as we are grateful for the courage of our parents, who made the hard choice to separate from us, turning us into "unaccompanied minors".
>
> But this duty of solidarity also applies today, and we call for an end to these intimidating procedures. We proclaim the legitimacy of citizens' right to scrutinize administrative, judicial or police practices. We stand with those who show solidarity with people in precarious situations without regard to the legality of their residency status. We pass the torch of solidarity to whistleblowers, to citizens critical of xenophobic policies, to those in solidarity with everyday life.

9. Humanitarian action in the form of life-saving measures taken by private individuals can be traced back over hundreds of years and across the globe.[3] Diverse faiths, beliefs and moral frameworks have shaped what emerges today as the modern humanitarian regime. Concepts of charity, solidarity and protection of "the stranger" figure prominently in the historical shaping of societies around the world. The anti-slavery movements, for example, consolidated a conviction in the legitimacy of personal action in violation of national laws, generated by the suffering of slaves and grounded in the ethics of universal humanity. As John Brown remarked at an anti-slavery convention in 1859, talk will never free the slaves. To end the

[2] See Union juive française pour la paix, "*Manifeste des enfants cachés*", 6 April 2017.

[3] In the present report humanitarian actions and/or services are defined as acts intended to protect life, including life with dignity. This definition includes actions carried out by organizations and individuals and covers both assistance and protection. It is based on the International Court of Justice definition, namely, acts "to prevent and alleviate human suffering wherever it may be found" and "to protect life and health and to ensure respect for the human being". It is also derived from the jurisprudence on dignified life. See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, para. 242.

abomination, abolitionists needed action. Time and again, individuals, alone or with others, have felt compelled to act to save lives or protect the right to live with dignity, in the name of solidarity with the common humanity of all human beings.

10. In our modern world, millions are on the move globally, with thousands dying each year as they seek to escape war, persecution, climate degradation and poverty. Responding in the name of deterrence, Governments are exacerbating, not reducing, the dangers faced by those on the move. Appalled by human suffering, people around the world are stepping up to offer rescue activities and support, including food, water, medical services, lodging and transportation. The result is that civic humanitarian services are reaching levels not seen since the aftermath of the Second World War.[4] Governments have reacted by harassing and even prosecuting both spontaneous and organized humanitarian acts.

11. At the direction of the Security Council, Governments have instituted counter-terrorism legislative frameworks that, given their stringency, potentially criminalize even life-saving medical aid or food relief, and in any case impose chilling effects on the provision of humanitarian aid for people desperately in need of help.

12. Various States have also adopted laws or measures preventing or hindering organizations from providing life-saving services to girls, women and lesbian, gay, bisexual, transgender and intersex persons, thus contributing to increased rates of otherwise preventable morbidity and mortality.

13. In the present report, it is asserted that saving lives should never be a crime. The argument is made that the failure to exempt humanitarian services from the overreach of punishing policies, the active obstruction of life-saving services and/or the criminalization of acts of solidarity and compassion constitute violations of the State's obligation to protect the right to life. Any deaths attributable to such measures amount to the arbitrary deprivation of life, which engages the responsibility of the State.

Prohibition of the arbitrary deprivation of life

14. The right not to be arbitrarily deprived of life is a foundational and universally recognized right, applicable at all times and in all circumstances, including during armed conflict and other public emergencies. The right to life is protected by international and regional treaties, customary international law and national legal systems (A/72/335, para. 14).

15. Article 6.1 of the International Covenant on Civil and Political Rights provides that every human being has the inherent right to life and that no one shall be arbitrarily deprived of his life. Article 26 provides that everyone is entitled to the equal protection of the law without any discrimination. Arbitrariness may be inferred from laws and practices that violate the principle of non-discrimination and that may be unnecessary and disproportionate (see A/HRC/35/23, para. 33). Legal measures aimed at protecting the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination. Any deprivation of life based on discrimination in law or in practice is ipso facto arbitrary in nature. As noted previously, deliberate intent on the part of the State is not required for a killing or a deprivation of life to be deemed arbitrary (ibid., para. 34).

16. States must prevent the arbitrary deprivation of life, including through an appropriate framework of laws, institutions and procedures. States must respect the right to life by ensuring that their organs and agents do not deprive any person of life

[4] See Liz Fekete, "Humanitarianism: the unacceptable face of solidarity", Institute of Race Relations, 2017.

arbitrarily. They must also protect and fulfil the right to life by exercising due diligence to prevent the deprivation of life by private actors.

17. The deprivation of life by the State cannot be justified on any basis other than that it is required to save life. Limitations on the right to life cannot be justified on the grounds of national security, the protection of property, the assertion of the authority of the State or the imposition of moral or religious values (see A/71/372).

18. The State has a positive and substantive duty to take preventive action where there are foreseeable threats to life originating from either State authorities or private actors within its jurisdiction. This obligation also arises in the event of life-threatening situations, such as natural hazards, that State authorities knew or ought to have known about, and it applies even if the population at risk acted unlawfully.[5] The obligation of States to respect and ensure the right to life extends to all threats that can cause death, even if such threats have not yet resulted in death.[6]

Right to life, including to food, shelter, water and sanitation, and health

19. The right to life is inextricably linked to the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights, such as the right to physical and mental health, the right to food or the right to water. In the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights of 1993 (A/CONF.157/23), the indivisibility of all human rights was reaffirmed, and a complaints procedure was established in 2008 under the Optional Protocol to the Covenant.

20. The Human Rights Committee recognized that the right to life should not be interpreted narrowly, noting that it places not only negative obligations on States (e.g. to not kill), but also positive obligations (e.g. to protect life), to ensure access to the basic conditions necessary to sustain life (see HRI/GEN/1/Rev.1, part I). It has affirmed that measures that restrict access to basic and life-saving services, such as food, health, electricity and water and sanitation are contrary to article 6 of the International Covenant on Civil and Political Rights (CCPR/C/ISR/CO/4, para. 12). It has expressed concern that article 6 may be violated by the absence of measures to deal with food and nutrition and to address, in cooperation with the international community, the causes and consequences of drought and other natural disasters (CCPR/CO/72/PRK, para. 12) For instance, denying access to water, through disconnections or otherwise, and destroying sanitation infrastructure can be deemed to be in violation of the right to life (see also CCPR/C/ISR/CO/3).

21. The failure of States to provide access to health care, including through restrictions on health-care providers,[7] may violate the right to life.[8] The respect by States of the right to health means that they must not discriminate with regard to the access of individuals to health-care services and must refrain from compelling health practitioners to deny health care to certain individuals. This obligation includes eschewing the formulation of policies or practices that directly or indirectly impede

[5] See European Court of Human Rights, *Keenan v. the United Kingdom*, No. 27229/95, 2001; *Osman v. the United Kingdom*, No. 87/1997/871/1083, 1998; *Budayeva and others v. Russia*, Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 2008; *Oneryildiz v. Turkey*, No. 48939/99, 2004.

[6] See CCPR/C/70/D/821/1998, para. 5.2; European Court of Human Rights, *Ilhan v. Turkey*, No. 22277/93, 2000, paras. 75–76; Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, 2007, para. 127.

[7] See Marine Buissonniere, Sarah Woznick and Leonard Rubenstein, "The criminalization of healthcare: safeguarding health in conflict", Johns Hopkins Bloomberg School of Public Health and Essex University, June 2018.

[8] See Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, 2006.

access to health care of groups that may be unpopular, such as migrants, or those suspected of or involved in opposition, terrorism or protest movements, as well as ordinary citizens, such as women exercising their reproductive rights (see E/CN.4/2003/58, para. 97). Respecting the right to health requires States to refrain from limiting access to health services as a punitive measure (see E/C.12/2000/4, para. 34), from formulating laws and policies that criminalize the provision of health care by health professionals or that interfere with their duty to provide services in an impartial manner (see A/68/297, para. 70 (c)). Failure to respect the right to health cannot be excused on the grounds of limited resources, security or any other grounds.[9]

Humanitarian action

22. With regard to humanitarian services, a State has two sets of obligations: a positive obligation to agree to and facilitate such services and a negative obligation not to impede the offer and provision of humanitarian services to individuals and populations in need.

23. International humanitarian law clearly imposes an obligation to respect and protect humanitarian actors. Parties to an armed conflict must protect civilian humanitarian actors, not just from attack, but also from harassment, intimidation, arbitrary detention and any other activities that might impede their work. This set of protections is of a corollary nature: the primary obligation is on the party to the conflict to provide for the population, yet when that party fails to discharge its obligation, individuals, as well as impartial humanitarian bodies, may offer and provide their services. Those protections undergird the prohibition under customary international humanitarian law of starving civilians as a method of warfare or combat and of attacking or destroying objects that are indispensable to their survival. Protecting humanitarian actors is an indispensable condition for the delivery of essential care.[10]

24. Under this framework, when the civilian population is not adequately supplied, no party to an armed conflict may arbitrarily withhold consent to offers of legitimate humanitarian services from an impartial humanitarian body. Refusing relief action or consignments is thus not a matter of discretion.[11] Since 1864, it has been an established matter under humanitarian law that the civilian population itself, as well as local organizations, may provide humanitarian services on their own initiative:

> If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place.... The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken.[12]

25. The obligation to allow and not impede humanitarian action has increasingly been recognized by "soft law" instruments in emergency situations. An example is

[9] See E/C.12/1999/5, para. 19, and A/HRC/S-17/2/Add.1, para. 81.

[10] See International Committee of the Red Cross (ICRC), Customary International Humanitarian Law Database, rule 31.

[11] See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987), para. 2808; Jelena Pejic, "The right to food in situations of armed conflict: the legal framework", *International Review of the Red Cross*, vol. 83, No. 844 (December 2001); and the Rome Statute of the International Criminal Court.

[12] Sandoz et al., *Commentary on the Additional Protocols*, para. 4885.

emerging international law on disaster assistance.[13] Principle 25 of the Guiding Principles on Internal Displacement provides that all authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced. It also provides that consent shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance. The International Red Cross and Red Crescent Movement, in its code of conduct, has called for the recognition of a distinct right to receive humanitarian assistance as a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. Those instruments tend to focus on State obligations with regard to international humanitarian actions, which raises a range of issues related to national sovereignty, many of which are not present in the case of domestic humanitarian actors.

26. Under international human rights law, the absolute right to life entails a negative obligation on the State not to engage in acts — such as the prohibition, criminalization or impediment of humanitarian actions — that would jeopardize the enjoyment of that right. States might justify such acts in response to perceived threats to national security or social norms. The Special Rapporteur equates them to a qualified use of force, thus requiring that they be both necessary and proportional. It is impossible to imagine how acts whose likely result is the potential death of civilians could ever meet those criteria (i.e. could be justified by the need to protect life).

27. Acts prohibiting or otherwise impeding humanitarian services violate the obligation of States to respect the right to life. Any death linked to such prohibition would constitute an arbitrary deprivation of life.

28. Such prohibition or impediment also violates the positive obligations of States. The Committee on Economic, Social and Cultural Rights has stated that the realization of such rights to the maximum of a State's available resources refers to both the resources existing within a State and those available from the international community through international cooperation and assistance (E/1991/23, annex III, para. 13). With respect to the right to food, the Committee articulated an obligation to seek and obtain international support to ensure the availability and accessibility of the necessary food (E/C.12/1999/5, para. 17). It also listed direct violations of the right to life, including:

> denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is proactive; the prevention of access to humanitarian food aid in internal conflicts or other emergency situations; adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to the right to food; and failure to regulate activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations (ibid., para. 19).

29. When the State is not providing food, water, shelter or rescue mechanisms sufficient to protect life and dignity, humanitarian actors are indispensable in delivering those services. As highlighted in the judgment from a French court excerpted below, the State has a positive obligation to seek and facilitate humanitarian action (through an act of delegation) and a negative obligation not to prevent it:

> Whereas, it being a matter of a fundamental freedom, the State, if it does not have the means to satisfy a request of a homeless person for shelter, must

[13] See resolution 46/182, para. 6, and draft articles on the protection of persons in the event of disasters, articles 6, 10 and 11 (A/71/10, para. 48).

delegate this duty to provide emergency shelter to any other legal or natural person having the capacity to accommodate homeless people; ...

Whereas it is therefore paradoxical that the State continues today to prosecute [Father Riffard] for having done what it should have done itself;[14]

30. Finally, both in and outside the context of armed conflict, laws and policies aimed at seeking to prevent the provision of life-saving and life-sustaining services to populations because of their ethnicity, religion or immigration status constitute a violation of article 6 of the International Covenant on Civil and Political Rights. The State may not fail to discharge its obligation to respect and protect the right to life and then exacerbate and compound that failure by precluding others from undertaking activities aimed at providing that core obligation, particularly if the actions or inactions of the State are driven by discriminatory motives or result in discrimination.

IV. Implications of measures to combat terrorism

31. In a series of resolutions, the Security Council has required Member States to apply various measures to counter terrorism. In general terms, the resolutions require the suppression, including through criminal prosecution, of those providing funds or services to designated terrorists or in other ways supporting terrorist acts.[15] The Council has added individuals and organizations to sanctions lists based in part on their having provided medical services and supplies.[16] It has not, however, defined what constitutes an act of terrorism (see A/HRC/16/51).

32. The resulting creation of a sizable body of new norms, amounting to a counter-terrorism regime (see A/71/384, paras. 23–27), has led to a corresponding expansion in donor demands on humanitarian actors:

> counterterrorism-based regulations and requirements are increasing and are spreading not only geographically but also in terms of the range of government and agency donors adopting more restrictive counterterrorism approaches. What may have once been seen as a tension arising primarily from one or two major donors may now constitute a range of counterterrorism-based policies and regulations that must be negotiated with virtually all government donors, donor funds, and intergovernmental donors.[17]

33. The bulk of those regimes are based on the premise of an overly broad notion of acts that support terrorism and do not take sufficiently into account protected, including life-saving, activities. In its resolutions the Security Council often proclaims, frequently in the preambular paragraphs, that Member States must ensure that counter-terrorism measures are in compliance with their obligations under international law, in particular international human rights, refugee and humanitarian law (see, e.g., Council resolution 2178 (2014)). As noted below, such compliance has been implemented inconsistently. The lack of a globally agreed definition of terrorism has meant that States have adopted unacceptably wide and nefarious definitions in national law. The knock-on effect is that a wide range of humanitarian acts are tagged

[14] Tribunal de police, Saint-Etienne, France, 11 June 2014.

[15] See Security Council resolutions 1373 (2001), 1456 (2003), 1566 (2004), 1624 (2005), 2178 (2014), 2341 (2017), 2354 (2017), 2368 (2017), 2370 (2017), 2395 (2017) and 2396 (2017).

[16] See Dustin A. Lewis, Naz K. Modirzadeh and Gabriella Blum, *Medical Care in Armed Conflict: International Humanitarian Law and State Responses to Terrorism* (Harvard Law School Program on International Law and Armed Conflict, September 2015).

[17] See Naz K. Modirzadeh, "Comment on the pilot empirical survey study on the impact of counterterrorism measures on humanitarian action", Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project, March 2017.

as being supportive of terrorism. What follows is the abrogation of the right to life, perpetrated under the convenient banner of terrorism.

International principles of humanity for the enemy

34. One of the most fundamental norms of international humanitarian law is the need to protect the provision of impartial medical care to all wounded and sick persons, including members of adversarial parties and the population under its control. This is a norm that is under direct attack by the application of counter-terrorism measures. For instance, States are convicting individual doctors who provide impartial medical treatment to designated terrorist groups.[18] Customary international law provides that medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances.[19] The term "medical personnel" is understood in a broad sense to include any person engaged in medical activities. It covers those working for the armed party, as well as medical personnel made available to that party by a humanitarian organization. Importantly, since 1864, international humanitarian law has also established legal protections for unassigned medical caregivers (those not authorized and controlled by a party to the conflict), such as indigenous doctors and nurses.

35. Under international humanitarian law, in no circumstances should any person be punished for having provided medical services compatible with medical ethics, regardless of the person benefiting therefrom.[20] This protection arises against the broader normative backdrop, in which the wounded and sick, as defined in international humanitarian law, must receive all feasible medical care required by their condition and that care must be provided as soon as practicable and be guided by medical need without adverse discrimination on any (i.e., non-medical) ground. If a party to the conflict is not providing such care, an impartial humanitarian body or private individual caregivers may themselves provide it. This system of protections has been conceived as bestowing upon medical personnel a right, and indeed a duty, to administer care to one's worst enemies if they are wounded, even in the middle of the most cruel battle.[21] In its common ethical principles of health care in conflict and other emergencies, the International Committee of the Red Cross insists that health-care personnel shall provide the necessary care with humanity, while respecting the dignity of the person concerned, with no discrimination of any kind, whether in times of peace or conflict, or during other emergencies.[22]

Prosecution for providing humanitarian aid to civilian populations

36. It bears repeating that international humanitarian law continues to apply to conflicts, notwithstanding the incidence of acts of terrorism; the occurrence of such acts does not displace international humanitarian law.

37. Particularly problematic counter-terrorism prohibitions are those relating to the provision of services and funding to those deemed terrorists by one party to a conflict (see A/HRC/23/39, paras. 22–26). The failure to clearly exempt humanitarian actors[23]

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[18] See United States District Court for the Southern District of New York, *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007).

[19] See ICRC, Customary International Humanitarian Law Database, rule 25.

[20] See Protocol I additional to the Geneva Conventions of 12 August 1949, article 16.1, and Additional Protocol II, article 10.1; see also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, article 18, and ICRC, Customary International Humanitarian Law Database, rule 26.

[21] See Sandoz et al., *Commentary on the Additional Protocols*, para. 660.

[22] See Buissonniere et al., "The criminalization of healthcare".

[23] Humanitarian actors include health-care providers not associated with humanitarian organizations.

inhibits humanitarian aid, as legitimate humanitarian activities might be deemed impermissible forms of support to so-called terrorists. Donors have similar concerns about the funding they provide. The fear of prosecution prevents critical aid from reaching the populations controlled by "terrorist" organizations and is thus likely to result in greater harm to life and civilian deaths.

38. One of the most influential countries in this area is the United States, given its extensive role in the global banking system.[24] Its laws appear to criminalize effectively all aid and support that are deemed to benefit designated "terrorist" organizations, including medical aid to civilian populations under their control. They prohibit the provision of "material support or resources to a foreign terrorist organization", including "expert advice or assistance". Only medicine and religious materials are exempted from this prohibition.[25] In 2010, the United States Supreme Court ruled that the material support statute was constitutional and explained that even support intended to promote peaceable, lawful conduct could free up resources of terrorist organizations for other purposes and could give the terrorist organization legitimacy.[26] This so-called fungible argument has further lowered the evidentiary test by rejecting specific intent to further "terrorist" activities and privileging the much lower threshold of knowledge about an organization's connection to "terrorism".

39. Some States have accepted the proposition that humanitarian actors should be able to provide humanitarian services to those under the control of "terrorist" organizations, but their response is ad hoc and may rely solely on prosecutorial discretion. The United Kingdom, for example, has issued policy guidance indicating that the risk of prosecution for legitimate humanitarian or conflict resolution work is low, but is not zero.[27] Such measures do not sufficiently protect humanitarians, as they are forced to rely on Government discretion in determining whether they will be criminally charged.

Funding and banking

40. Bans on funding or providing economic resources to a "terrorist" organization have also proven problematic, and they impose significant burdens on non-governmental organizations (NGOs) and individuals providing potentially vital assistance. Governments and even banks are empowered to make potentially arbitrary decisions concerning the assets of individuals and organizations, including humanitarian organizations. The United States, for example, has frozen the assets of numerous Muslim charities, and many Muslims are afraid to give money to charity groups in case they may be suspected of providing material support to terrorism (A/HRC/6/17, para. 42).

41. The Financial Action Task Force, an intergovernmental body established in 1989 to address the issue of money-laundering and "terrorist" financing, has failed to provide specific measures to protect the civil society sector from undue restrictions. The Task Force, in its recommendation 8 on combating the abuse of non-profit organizations, recommends that countries review the adequacy of their laws and regulations to ensure that entities are not abused for the financing of terrorism. Very

[24] See Duke Law International Human Rights Clinic and Women Peacemakers Program, "Tightening the purse strings: what countering terrorism financing costs gender equality and security", March 2017.

[25] See Code of the Laws of the United States, 18 U.S.C. § 2339A and § 2339B.

[26] See United States Supreme Court, *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010). This case dealt with human rights work provided directly to a designated terrorist organization. The Court indicated that Congress had avoided any restriction on any activities not directed to, coordinated with, or controlled by foreign terrorist groups.

[27] See United Kingdom, Home Office, Office of Financial Sanctions Implementation, "Guidance for information note: operating within counter-terrorism legislation", June 2016.

few if any instances of "terrorism" financing have been detected as a result of these supervisory measures, whereas recommendation 8 has been misused by States to violate international law (A/HRC/23/39, para. 25).

42. Humanitarian organizations are now routinely monitored by banks and major donors that insert clauses into their agreements requiring compliance with Security Council resolutions, counter-terrorism laws or other administrative or regulatory requirements. Donors and banks may require organizations to vet their local partners and provide personal information on individuals and detailed reporting on activities. These demands are time-consuming and financially burdensome. Moreover, humanitarian organizations have expressed concerns that those requirements undermine their neutrality and make local acceptance harder to achieve.[28] Banks can deny banking privileges at their discretion to any organization considered a legal risk under the counter-terrorism regime.[29] The resulting limited access to banking transactions is a particular problem for smaller as well as Muslim non-profit organizations and has increased danger in the field as a result of individuals travelling with more cash.

43. Importantly, prohibitions on the financing of terrorism may capture not only payments to partners on the ground, but also a wide variety of operational expenditures, such as administrative fees, checkpoint payments or taxes or purchase of fuel, all of which can be considered prohibited economic resources under counter-terrorism measures.[30]

44. In response to such concerns, some States point to licensing programmes that would protect humanitarian actors from prosecution, but this bureaucratic, often lengthy process does not address the potentially fast-changing needs of populations or unanticipated payments that are made to contend with local circumstances. Equally problematic is the danger that obtaining a licence may undermine the reputation for neutrality and endanger aid workers in the region, who might be perceived as agents of the licensing governments.

Impact on affected populations

45. The net effect of those burdens, along with the increasingly risk-averse responses of governments, banks, donors and humanitarian agencies, is a significant decrease in humanitarian aid for critically endangered populations. For example, the United States shut down Al Barakat, the main organization providing money transfers to Somalia, an action that had a deleterious humanitarian impact on the region, even though the Government never disclosed evidence of ties to terrorism (A/HRC/6/17, para. 48). Humanitarian organizations were asked to perform pre-vetting finance checks, tracking systems, real-time monitoring, verification of partners' shareholders, a bond system (requiring a deposit of 30 per cent of the value of goods transported) and the contractual assumption of 100 per cent of financial liability for shipments lost or stolen by contractors. Funding to humanitarian organizations operating in Somalia declined by 50 per cent from 2008 to 2011. Once the famine hit, the United States Office of Foreign Assets Control eased requirements, indicating that incidental benefits to the designated terrorist organization, Al-Shabaab, such as food and medicine, were not a focus of its sanctions enforcement, but this was not clear

[28] See Sara Pantuliano and others, "Counter-terrorism and humanitarian action: tensions, impact and ways forward", Humanitarian Policy Group, Policy Brief 43, October 2011.

[29] Even though it has since been modified, early guidance from the Task Force, in its recommendation 8, may have contributed to this risk-averse banking climate.

[30] See Pantuliano et al., "Counter-terrorism and humanitarian action".

protection against criminal enforcement.[31] A quarter of a million people starved during that famine.

46. In Gaza, relief efforts have been severely hampered since the election of Hamas, after the United States and the European Union designated it a terrorist organization. Non-profit organizations need to apply for licences from the Office of Foreign Assets Control on a project-by-project basis, and they face significant administrative burdens. Organizations cannot coordinate with government officials, which in turn leads to the Hamas government harassing humanitarian agencies for their perceived links to the United States and European Union. Many Islamic organizations have stopped their operations in Gaza to avoid prosecutorial scrutiny in the United States. International NGOs have developed their own independent relief programmes to avoid the legal hurdles of partnering, causing the provision of parallel services and the duplication of efforts.[32]

47. The potential abuse of counter-terrorism regimes is evidenced by the restrictions Myanmar has placed on aid for internally displaced persons in Kachin State, where it has in some instances effectively blocked all aid. An estimated 97,000 such persons, around 76 per cent of whom are women and children, are spread across 140 displacement sites in the State. The inability of humanitarian groups to reach this population is causing widespread shortages of food, water, medical care and other essential supplies, as well as increased human suffering. In the face of those shortages, on 21 May 2018 the Kachin State Minister of Security and Border Affairs sent a letter to the Kachin Baptist Convention, one of the largest providers of aid to displaced communities, threatening it with prosecution under the Unlawful Association Act for providing aid to communities in conflict-affected areas of the State.

A solid exemption regime

48. There is a sense of an international counter-terrorism regime out of control, its tentacles reaching every corner of political, financial and civic life. There have been some targeted efforts to mitigate the unintended consequences of counter-terrorism on humanitarian aid in particular regions,[33] though primarily through ad hoc and piecemeal exemptions.

49. For instance, the Security Council, in its resolution 1916 (2010), exempts from sanctions "the timely delivery of urgently needed humanitarian assistance in Somalia, by the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners". But this measure does not apply to other humanitarian programmes and must be renewed repeatedly. The General Assembly, in its recent resolutions on the United Nations Global Counter-Terrorism Strategy Review (resolutions 70/291 and 72/284), urged "States to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law".

50. The European Union, in its Directive 2017/541 on combating terrorism, excludes from the scope of the Directive the provision of humanitarian activities by

[31] Ibid.

[32] Ibid., see also Office of the United Nations High Commissioner for Human Rights, "Occupied Palestinian Territory: bleakest picture yet, says UN expert after regional visit", 29 June 2018.

[33] The United Kingdom initiated a "safer corridor pilot project" for remittance flows to Somalia, focused on the ability of non-governmental organizations to send money to support their own operations (see A/70/371).

impartial humanitarian organizations recognized by international law, including international humanitarian law. The Directive has the potential to have a significant impact, and Member States have until 8 September 2018 to make the necessary legal and regulatory changes to comply with it.

51. Certain States provide possible national models. Switzerland exempts funds intended to support acts that do not violate the rules of international law on the conduct of armed conflicts. Canada also excludes an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law. Australia exempts from the ban on association with terrorist organizations those that do so only for the purpose of providing aid of a humanitarian nature, but this exemption is absent from much of its broader counter-terrorism regime. [34] The 2002 Terrorism Suppression Act of New Zealand provides that making property or financial or related services available to designated terrorist entities is prohibited unless a lawful justification or reasonable excuse exists, such as where the property (e.g. items of food, clothing or medicine) is made available in an act that does no more than satisfy essential human needs of an individual (or a dependant of an individual) designated under the Act.

52. Such limited initiatives are unlikely to solve the global and daily encroachment on principles that have formed the backbone of international law and humanitarian actions. Rather than making vague references to international law, the Security Council should adopt a resolution expressly clarifying that humanitarian protection and assistance must never be conceptualized as support for terrorism and suppressed or criminalized on that basis. Additionally, it should mandate sector-wide exemptions within the sanctions regimes of the United Nations and Member States. In the meantime, States should issue similar express clarifications and clearly and unambiguously exempt humanitarian actions from their counter-terrorism measures at every possible opportunity, nationally, regionally and internationally.

V. Targeting of humanitarian aid to migrants

53. States are increasingly relying on the three pillars of militarization, extraterritorial border control and deterrence to shield their countries from irregular migration. An added tactic is deterring humanitarian services for migrants at borders to prevent life-saving rescue missions and transportation and, within countries, to impede the provision of food, shelter, medical care and other services. Deterrence is achieved largely through the criminalization of such humanitarian services. Emboldened by Government actions, anti-migrant segments of the population threaten or attack those who are behind humanitarian acts.

54. Humanitarian services play a central role in preventing migrants' and refugees' unlawful deaths. By deterring those services through their criminalization or other measures, States violate their obligation to prevent, combat and eliminate arbitrary killings and the deprivation of life (resolution 71/198). Such deterrence measures based on the legal status of the beneficiaries exacerbate the risks to life, which are or should be known to States.

55. In adopting the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, in 2000, States committed to the protection of the rights of migrants who have been smuggled. The Protocol proclaims the need to provide migrants with humane

[34] Phoebe Wynn-Pope, Yvette Zegenhagen and Fauve Kurnadi, "Principles guiding humanitarian action", *International Review of the Red Cross: Humanitarian Debate: Law, Policy, Action*, vol. 97, No. 897/898, pp. 244–247 (2015).

treatment and full protection of their rights. It envisions cooperation with civil society, including NGOs, to ensure the proper training of State personnel in the protection of migrants' rights. It requires States to take all appropriate measures to preserve and protect the rights of migrants, including, in particular, the right to life. It obliges States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol.

56. In September 2017, Member States reiterated their determination to save lives and committed to strengthening support for rescue efforts over both land and sea (resolution 71/1). In July 2018, they concluded negotiations on a global compact for safe, orderly and regular migration, in which they committed to saving lives and preventing migrant deaths and injuries, including through individual or joint search-and-rescue operations and the standardized collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants.

57. In situations where States are unwilling or unable to provide humanitarian relief themselves, they must let others provide such services. A range of practices may put the lives, health and safety of migrants at risk, including cruel, inhumane or degrading reception conditions and the denial of humanitarian assistance (A/HRC/37/34, para. 15). For this reason, States must not criminalize or otherwise penalize the provision of support or assistance to migrants.[35]

Protection of life at the border

58. States are targeting those engaged in search and rescue, utilizing two primary tactics. The first is to accuse humanitarian organizations of colluding with smuggling networks, a crime under most national laws. For example, an Italian prosecutor, Carmelo Zuccaro, opened an investigation into possible collusion between rescue vessels and smugglers,[36] and the Government of Italy confiscated the vessel of Jugend Rettet and accused its crew of collusion.[37] Moroccan authorities are investigating Helena Maleno for colluding with smugglers in directing rescue vessels to boats in distress.[38] To date, no evidence has been made public indicating that any humanitarian actor who has been charged has colluded with smugglers. It appears that Government officials are harassing humanitarian actors with baseless investigations and prosecutions to convince them and others to cease their work.

59. The second tactic has been to place administrative burdens on, and sometimes even to criminalize, humanitarian action on the border. To the extent that any justification is given, States argue that rescue creates a pull factor. In effect, States have co-opted the language of humanitarianism, claiming to protect lives by discouraging migrants from embarking on dangerous journeys. In making this argument, States ignore the push factors, the dangers within the countries of origin and transit. They ignore, and do not count, the potential deaths and suffering that would occur were migrants and asylum seekers forced to remain. This is an essentially out-of-sight, out-of-mind argument.

60. This second tactic includes the refusal of Italy and Malta to allow humanitarian vessels to dock, effectively keeping them out of commission while they wait to find a safe port at which to discharge the migrants. It includes similar efforts by Thailand to deter sea rescues of Rohingya. It includes the refusal to grant permits to human

[35] See also the Convention on the Rights of the Child, article 22.

[36] See Forensic Architecture Agency at Goldsmiths, University of London, "Blaming the rescuers", 2017.

[37] See Fekete, Humanitarianism.

[38] See Global Voices, "Spanish activist Helena Maleno's trial in Morocco is a 'way to intimidate' human rights defenders, her supporters say", 31 January 2018.

rights defenders on the United States border who wish to enter federal lands to leave water for migrants in the desert, as well as the prosecution of volunteers for littering when they succeed in leaving water. It includes a felony prosecution for harbouring migrants by providing shelter in or near the desert in the territory of the United States. All of those steps are designed to make rescue efforts more difficult.

61. Such official actions and critiques of humanitarian actions, relayed by the media, have been said to incite anti-immigrant, anti-refugee and anti-rescue sentiment, which in turn prompt more official actions undermining rescue. As one NGO reported, there has been a delegitimization and criminalization campaign, creating a toxic narrative that undermines rescue and that will result in more deaths.[39]

62. States that are attempting to prevent rescues on the discriminatory basis of the population's immigration status, and potentially its race, religion and ethnicity, are violating international human rights law (and maritime law for sea rescues). If other individuals — not undocumented migrants — needed help in the desert or at sea, States would encourage and direct such life-saving aid.

Provision of life-sustaining aid within countries

63. Many humanitarian organizations and actors help migrants and refugees once they have crossed the border by providing food, water, shelter, medical aid and other services. Much of this aid consists of individuals simply responding to the needs of another person found within their community.

64. Such responses go by numerous names. The Constitutional Court of France recently recognized the freedom to aid others, for a humanitarian purpose, without consideration of the regularity of their residency status, insisting that the French notion of "fraternity" is a constitutional principle. The Court left it to the legislators to balance the constitutional principle of fraternity with the sovereign right to control the border. Pope Francis uses the language of encountering the other, and urged individuals to "tear down the wall of comfortable and silent complicity".[40]

65. In many countries around the world, particularly in the global South, such humanitarian actions are both frequent and, to a large extent, protected. The majority of refugees in the global South live in urban centres (58 per cent), outside of formal camps. This includes four in every five Syrian refugees in Jordan.[41] Along with migrants, refugees settle themselves, thanks to host communities' gestures of life-saving solidarity. In fact, such acts of solidarity constitute the unspoken backbone of the international refugee assistance regime.

66. In the global North, in contrast, Governments have made it a crime to conceal or harbour "irregular" migrants, and there is no stated exemption for humanitarian actors. For instance, in the United States, one can be sentenced to serve up to 5 years in prison for harbouring an undocumented immigrant, while those acting for commercial advantage or private financial gain may receive a sentence of up to 10 years.[42] One volunteer, Scott Warren, is currently being prosecuted under this statute for having sheltered migrants in the desert. A law adopted recently in Hungary criminalizes the facilitation of illegal immigration, human rights advocacy and litigation support.

[39] See Forensic Architecture Agency, "Blaming the rescuers".

[40] Message of His Holiness Pope Francis for the "Second Holy See-Mexico Conference on International Migration", Vatican City, 14 June 2018.

[41] See Office of the United Nations High Commissioner for Refugees, "Syrian refugees living outside camps in Jordan", 18 March 2014.

[42] See Code of the Laws of the United States, 8 U.S.C. § 1324. Those who hire an undocumented minister or missionary are exempt.

67. Anti-immigrant vigilantes are also targeting human rights defenders, with officials often turning a blind eye to the harassment. In Lesbos, Greece, Philippa and Eric Kempson were spurred to action by the death of migrants near their home. They devoted time and money to saving lives and even rented a building to warm migrants arriving in boats to prevent deaths from hypothermia. In response, they received death threats, were threatened with prosecution and faced legal action seeking to prevent their use of the building, and now are apparently being evicted from their home.

68. States should exempt humanitarian assistance from laws prohibiting "assisted stay" on the basis that simply providing the basics of human existence — food, water, shelter, sanitation and clothing — should not be criminalized. In France, when the mayor of Calais attempted to ban the distribution of food to migrants, an administrative court in Lille overturned the ban. It also ordered the installation of toilets, showers and facilities for drinking water and threatened the mayor with fines if he disobeyed.[43] The court correctly found that the mayor had interfered in a serious and manifestly unlawful manner with the freedom to come and go, the freedom of assembly and, by preventing migrants from satisfying basic needs, the right not to be subjected to inhumane or degrading treatment, enshrined in article 3 of the European Convention on Human Rights.[44]

69. In compliance with their obligation to respect and protect the right to life, States must eliminate laws and policies that prevent humanitarian aid based on the immigration status of the beneficiaries and ensure that government officials at all levels do not harass humanitarian actors. They must also protect them from unlawful threats and the violence of private vigilantes.

"Humanitarian" smuggling

70. Humanitarians helping migrants actually cross the border would appear to present the most difficult case, as international law clearly grants States the right to control their borders. This difficulty is illusory. Slaves were smuggled out of the United States, Jews out of Europe and dissidents out of the Union of Soviet Socialist Republics. As the Constitutional Court of Canada found, "Humanitarian aid to fleeing people is not merely hypothetical; it is a past and current reality".[45]

71. Those drafting the Smuggling of Migrants Protocol recognized the need to protect humanitarian motivations by limiting the definition of smuggling to the procurement of illegal entry by a person who acts for a financial or other material benefit. Their specific intent was to exclude humanitarians from criminal prosecution. The financial or material benefit threshold was included

> in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.[46]

72. Few Governments comply with this requirement. The Facilitators Package of the European Union, which comprises Directive 2002/90/EC and its Framework Decision 2002/946/JHA, directs member States to make it a crime for any person to intentionally assist entry or transit across a member State. It does not incorporate the

[43] See Fekete, Humanitarianism.

[44] See "Le Tribunal de Lille suspend l'arrêté interdisant la distribution de repas aux migrants", Defenseur des droits, 22 March 2017.

[45] See Supreme Court of Canada, *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754.

[46] See *Travaux Preparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations publication, Sales No. E.06.V.5), p. 469.

concept of financial benefit, except with reference to irregular stay.[47] Member States have the option not to impose penalties in instances of humanitarian assistance. The Directive mandates that member States prosecute a person who for financial gain intentionally assists an individual to reside unlawfully within a member State. There is, however, no explicit humanitarian exception. According to a report by the Fundamental Rights Agency, all 28 member States make it a crime to facilitate irregular entry, but only 8 explicitly transpose the optional humanitarian clause into their national law.[48]

73. The European Commission acknowledged that the Facilitators Package was intended to put appropriate sanctions in place, while avoiding the risk of criminalizing the provision of humanitarian assistance to migrants in distress. It conceded that interfering with humanitarian aid, and thereby failing to assist those in need, would violate the Charter of Fundamental Rights of the European Union. Yet member States have continued to criminalize the provision of humanitarian aid. An investigation in Europe in 2017 documented the prosecution of 45 individual humanitarian actors under anti-smuggling or irregular entry laws in 26 separate actions in 2015 and 2016.[49] But a European Parliament study concluded that data on the rates of prosecution and conviction of those who provided humanitarian assistance to irregular migrants were largely lacking.

74. The international community determined, in promulgating the Smuggling of Migrants Protocol, that the real threat to global order was smuggling by criminal networks, not humanitarians. The Protocol exempts humanitarian acts carried out to protect migrant rights. As the Supreme Court of Canada found, when it effectively added a humanitarian exemption to the illegal entry law of Canada, "it would depart from the balance struck in the Smuggling Protocol to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid". Only with a humanitarian exemption would the legislation reflect the values and principles of customary and conventional international law.[50]

75. It is unsustainable for States to prosecute and target people for acting on the human instinct to help others in need. Criminal laws are designed to encourage decent behaviour, not prosecute it.[51] States must reconsider their policies and base them on the prevention of arbitrary killings and unlawful deaths. Instead of targeting those who are protecting life, States should prosecute those endangering it, first and foremost the criminal networks that exploit and mistreat migrants and asylum seekers. This would be the best policy for deterrence.

VI. Criminalization of the provision of life-saving services to women and lesbian, gay, bisexual, transgender and intersex persons

76. The provision of humanitarian services to women and girls, as well as to lesbian, gay, bisexual, transgender and intersex populations, has been criminalized, deterred

[47] The decision not to require smuggling to involve a financial benefit apparently stems from difficulties in tracing financial flows connected to migrant smuggling (see European Commission, Commission staff working document on the REFIT (Regulatory Fitness and Performance Programme) evaluation of the European Union legal framework against facilitation of unauthorized entry, transit and residence: Facilitators Package, 22 March 2017).

[48] See European Union Agency for Fundamental Rights, "Criminalisation of migrants in an irregular situation and of persons engaging with them", 2014.

[49] See Fekete, Humanitarianism.

[50] See Supreme Court of Canada, *R. v. Appulonappa*.

[51] See Fekete, Humanitarianism.

or stigmatized. Laws, policies and practices that impede the work of those providing essential sexual and reproductive health services can lead to discrimination, and have consequences for beneficiaries' pursuit of the right to life. There is conclusive evidence that efforts to cut back on or deter the provision of quality contraceptive and antenatal services, HIV/AIDS treatment and safe abortion care contribute to increased rates of otherwise preventable death, including maternal and infant mortality and death and injury from unsafe abortion.[52]

77. The most recent and wide-ranging example, the so-called gag rule of the United States, entitled "Protecting Life in Global Health Assistance" (May 2017), is of a scale that is unprecedented. It requires foreign actors receiving assistance from the United States to certify that they do not use their own non-United States funds to provide abortion services, counsel patients about it or refer them for abortion or advocate for the liberalization of abortion laws. Exceptions to the rule, also in place under previous versions of the global gag rule, are not widely known, understood or acted upon. The rule covers health-related activities in about 60 low- and middle-income countries, including programmes on HIV/AIDS, Zika virus, maternal and child health, malaria and nutrition.[53] Up to $9.5 billion in global health aid is subject to the rule, with sub-Saharan Africa, the largest recipient, being hit the hardest.

78. The global gag rule, flawed on evidentiary and public health grounds,[54] imperils the work of health-care providers, interferes with their freedom to practise to the level of recognized professional standards and erodes the integrity of health systems and services. In low-income settings, for example, integrated or co-located health programmes must now dismantle "all-in-one" services and dissolve integrated care networks while meeting an additional administrative burden of proving compliance with an overly broad, confusing and poorly defined policy whose obligations and methods of compliance are also unclear, as established in an evaluation undertaken by the United States Agency for International Development.

79. The gag rule imposes an unconscionable choice on providers who depend on global health aid to deliver essential services: to abandon the provision of legal, technically sound and life-saving services and no longer provide adequate, accurate and unbiased information, or to face potentially drastic reductions in funding that would mean shutting down life-saving services, firing staff and closing clinics. Those who find the means to continue to provide services targeted by bans may also face — as do their clients — additional social stigma and negative pressure from other providers and officials generated by the gag rule. The gag rule thus also distorts the balance of care, seeking to silence those who wish to speak frankly and competently about, or wish to advocate for, legal and safe abortion while giving an advantage to those who wish to organize in opposition to abortion.

80. The main outcome of such a policy is likely to be an increase in the number of unlawful deaths, particularly of women and girls, but not only that.[55] The World Health Organization estimated in 2011 that, during the last period of time in which the global gag rule was imposed far more narrowly, the average number of, largely

[52] See Guttmacher Institute, "Adding it up: investing in contraception and maternal and newborn health, 2017", 2017.

[53] See Sneha Barot, "When antiabortion ideology turns into foreign policy: how the global gag rule erodes health, ethics and democracy", *Reproductive Health in Crisis*, Guttmacher Policy Review special series, vol. 20 (Guttmacher Institute, 8 June 2017).

[54] See Jerome A. Singh and Salim S. Abdool Karim, "Trump's 'global gag rule': implications for human rights and global health", *The Lancet*, vol. 5, No. 4 (1 April 2017).

[55] See "Trump's 'Mexico City' Policy or 'Global Gag Rule'", Human Rights Watch, 14 February 2018.

unsafe, abortions rose 40 per cent in 20 countries. Another study found that countries most affected by the gag rule had significantly increased rates of induced abortions.[56]

81. Laws criminalizing same-sex relations, transgender identity (through laws prohibiting cross-dressing), prostitution and sex work and laws aimed at restricting public discussions of gender and sexuality, labelled by some States as propaganda against so-called traditional family values, have created a range of administrative, legal and social barriers to the provision of services directed at lesbian, gay, bisexual, transgender and intersex persons. The stigmatization or criminalization of such services has been interpreted by non-State actors as lending legitimacy to the violence they direct against humanitarian actors.

82. Such criminalization and crackdowns have hindered the ability of organizations to safely deliver services (see A/HRC/38/43, para. 59). They may be improperly charged with public incitement to crime or conspiracy.[57] Even if their work is not explicitly criminalized, the hostile application of national policy can effectively block or heavily restrict its scope. Criminalization and stigma can also stop lesbian, gay, bisexual, transgender and intersex persons from receiving life-saving treatment. They may be reluctant to access health-care services, such as treatment for HIV, and medical providers may refuse treatment when they are at risk of arrest for providing such services (ibid., paras. 53–54).

VII. Conclusion

83. **By failing to clearly exempt humanitarian actors from anti-terrorism statutes, Governments are knowingly reducing the provision of life-saving aid to desperate people. Such responses to terrorism also risk unwittingly eroding a normative pillar of international law. By harassing and prosecuting volunteers who rescue migrants on dangerous terrain or provide transportation, food and shelter to those in need, Governments are knowingly endangering lives. By criminalizing, stigmatizing or otherwise blocking the provision of sexual and reproductive services, States are knowingly depriving individuals, especially women, girls and lesbian, gay, bisexual, transgender and intersex persons, of life-saving care.**

84. **In all such actions, Governments are violating their obligation to respect and protect the right to life under international human rights and humanitarian law. Humanitarian actors, defined as individuals and organizations providing life-saving services and protection to vulnerable populations, are assisting States in meeting their obligations to protect and fulfil the inherent right to life, without discrimination, and to prevent the arbitrary deprivation of life. Humanitarian exemptions from prosecution, adopted by some States and recommended by international bodies, must be implemented as a matter of urgency. Harassment and stigmatization must cease. Saving lives is not a crime.**

VIII. Recommendations

85. **It is recommended that the Security Council:**

(a) **Adopt a resolution exempting humanitarian actions from all counter-terrorism measures, including sanctions, and insisting on a broad system of legal**

[56] See Eran Bendavid, Patrick Avila and Grant Miller, "United States aid policy and induced abortion in sub-Saharan Africa", *Bulletin of the World Health Organization*, 2011.

[57] See "Criminalization of human rights defenders", Inter-American Commission on Human Rights (OEA/Ser.L/V/II.Doc 49/15), 31 December 2015.

protection and normative safeguards under international human rights and humanitarian law;

(b) Specify in all counter-terrorism resolutions that no organization or person providing humanitarian relief should be punished on account of their delivery of such services to an alleged terrorist or a person who is a member of, associated with or supportive of a terrorist organization and that access to medical care and other life-saving relief by the latter should never be denied on the basis of such a designation;

(c) Reaffirm in no uncertain terms the fourth pillar of the United Nations Global Counter-Terrorism Strategy and the obligation of States to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

86. **It is recommended that the General Assembly include explicit language exempting and/or protecting humanitarian actions in resolutions on countering terrorism, migration and other relevant topics.**

87. **It is recommended that the Human Rights Council:**

(a) Include explicit language exempting and/or protecting humanitarian actions in resolutions on countering terrorism, migration and other relevant topics;

(b) Adopt a resolution calling for a thematic panel discussion on the human rights implications of the prevention of humanitarian work in the context of deterring migration and countering terrorism or violent extremism, and sexual and reproductive health;

(c) Recognize, in relevant resolutions, that an alleged terrorist or a person who is a member of, associated with or supportive of a terrorist organization should never be denied access to medical care on the basis of such designation, and that no person providing health services should be punished on account of the beneficiaries' designation.

88. **It is recommended that the Office of Counter-Terrorism:**

(a) Formally include civil society actors in all high-level United Nations counter-terrorism conferences;

(b) Establish a United Nations mechanism for strategic and sustained engagement with civil society, including humanitarian actors, around the agendas on countering terrorism and preventing violent extremism.

89. **It is recommended that States:**

(a) Publicly champion the work of humanitarian actors, whether they provide services in the context of conflict or migration or to women, lesbian, gay, bisexual, transgender and intersex persons or other populations;

(b) Recognize humanitarian action as a constitutional or national value and as the expression of the country's treaty obligations and/or of the common values of humanity;

(c) Adopt or revise national legislation on smuggling to explicitly exempt humanitarian action from its provisions, covering the facilitation of irregular entry, transit and residence, and ensure that no investigation is opened and no prosecution pursued against private individuals and organizations assisting migrants for humanitarian reasons;

(d) Review and amend legislation and policies on countering and preventing terrorism and violent extremism with a view to excluding from the scope of offences the provision of humanitarian services and the protection of

humanitarian access and actions and to ensuring that access to medical care of an alleged terrorist or a member or supporter of a terrorist organization should never be denied on the basis of such a designation and that no person providing health services should be punished on account of the beneficiaries' designation;

(e) Instruct armed forces and police that life-saving humanitarian services should never be denied and that individuals providing such care should not be arrested, harassed or intimidated;

(f) Facilitate regular dialogue among humanitarian organizations, banks, financial regulators and other government departments to limit the impact of counter-terrorism de-risking;

(g) Establish adequate systems to monitor the number of "humanitarian" prosecutions and convictions, as well as their effects;

(h) Remove impediments to the provision of comprehensive and high-quality sexual and reproductive health care, including safe abortion services, and take all reasonable measures to enable health-care providers to undertake their work without undue interference, intimidation or restrictions;

(i) Protect organizations and individuals providing life-saving services to lesbian, gay, bisexual, transgender and intersex populations against arbitrary and discriminatory restrictions and interference in their work.

90. It is recommended that donor Governments:

(a) Develop model safe harbours or exemptions to existing criminal and other laws and reconcile disparate approaches to the provision of humanitarian assistance, particularly in those areas where "terrorist" groups control territory or access to a civilian population;

(b) Appoint individual experts or establish working groups to monitor the protection of national and international humanitarian services;

(c) Explore innovative ways of minimizing the impact of counter-terrorism measures on humanitarian actions;

(d) Amend all aid funding provisions that seek to restrict or otherwise impede or deter the provision of and access to comprehensive and high-quality sexual and reproductive health services, information and support;

(e) Continue efforts to narrow the funding gap for comprehensive sexual and reproductive health services and support humanitarian actors that provide such services, including safe and legal abortion and services specific to the lesbian, gay, bisexual, transgender and intersex populations;

(f) Monitor and report regularly on the impact of the global gag rule and similar policies on actors providing sexual and reproductive services and on the right to life of women and girls, lesbian, gay, bisexual, transgender and intersex persons and the population in general.

91. It is recommended that donor countries and humanitarian actors establish joint forums, where they do not yet exist, and engage in open and inclusive dialogue about the impact on humanitarian action of counter-terrorism measures and measures to prevent or counter violent extremism, feeding into sector-wide policy developments.

92. It is recommended that humanitarian actors engage in sector-wide dialogues and develop sector-wide policies, proposals and advocacy positions on minimizing the impact of laws and measures seeking to prevent humanitarian services and access.